In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-289

KENT B. DIEHL, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Pet. App. 1A-12A) is unofficially reported at 72-2 USTC par. 9527. The opinion of the Court of Appeals (Pet. App. 1B) is reported at 457 F. 2d 511.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 2B-3B) was entered on March 20, 1972, and a peti-

tion for rehearing was denied on May 31, 1972 (Pet. App. 4B). The petition for a writ of certiorari was filed on August 21, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner is entitled to intervene as party plaintiff in the instant refund litigation, instituted by her former husband, on the ground that the underlying claim for refund was filed for petitioner's benefit—even though it was signed and filed solely by her former husband after their divorce—because it related to a pre-divorce taxable year in which they were domiciled in a community property state.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 7422. CIVIL ACTIONS FOR REFUND.
>
> (a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.
>
> * * * * *

STATEMENT

In 1958, petitioner Beth Koehler Diehl and Kent B. Diehl, Sr., then married and living in Texas, filed a timely joint return for 1957, reporting and paying a tax due of $5,548.21. The Diehls were divorced in Mexico in 1959, in proceedings at which both parties were represented by counsel. In March 1962, Mr. Diehl, who had remarried and moved to California, filed a claim for refund of the 1957 taxes. The claim was signed and filed in his name only. No claim for refund for 1957 was filed by or in the name of petitioner Beth Koehler Diehl. The Commissioner rejected Mr. Diehl's claim, and in September 1962, Mr. Diehl filed a suit for refund of the 1957 taxes. (Pet. App. A 1A-2A, 8A-9A.)

In 1966, Mr. Diehl died. Shortly thereafter petitioner was allowed to intervene as plaintiff in the decendent's refund suit on the ground that she and the decedent had filed a joint return for 1957 and that the taxes paid for that year represented community property. Several months later, the district court granted petitioner's motion to be substituted for the decedent in the suit, as executrix of his estate.

The court subsequently vacated the substitution order. In a memorandum opinion entered on November 28, 1968, having determined that petitioner and her attorney had committed a fraud on the court, the district court ruled that petitioner was estopped from claiming to be the decedent's widow, *i.e.*, from challenging the validity of the 1959 divorce, and that

her appointment as executrix was void. On October 31, 1969, the court dismissed petitioner's intervention and the refund suit for lack of jurisdiction. (Pet. App. A 3A-5A.) The court of appeals affirmed, with the sole reservation that the suit should be reinstated with petitioner as party plaintiff in her own right if she could show that a claim for refund had, in fact, been filed in her personal behalf. (*Diehl* v. *United States*, 438 F. 2d 705, 711 (C.A. 5).) Petitioner's subsequent petition for certiorari was denied on October 12, 1971 (404 U.S. 830).

The instant proceedings in the district court arose upon petitioner's motion for reinstatement of the refund suit on the ground that the decedent's claim for refund was filed for her benefit and entitled her to prosecute the action in her own right as plaintiff (Pet. App. A 1A). The district court denied the motion, ruling that the court of appeals had contemplated reinstatement of the suit only if petitioner had filed a personal claim for refund. The court held that the decedent's claim for refund was not filed for petitioner's benefit, noting that when the claim was filed, the decedent was married to another woman and living in California, and that there was no showing that petitioner either expressly or impliedly authorized the decedent to act on her behalf in filing the claim. (Pet. App. A 6A-11A.) The court entered an order dismissing with prejudice the personal intervention of petitioner in the refund suit (Pet. App. A 12A-13A). The court of appeals affirmed (Pet. App. B 1B).

ARGUMENT

The decision below is correct, and there is no conflict or other reason for further review.

Section 7422(a) of the 1954 Code, *supra*, p. 2, provides that a taxpayer may not maintain a refund suit unless he has previously filed a claim for refund. The petitioner does not contend that she filed a claim for refund in this case. She argues instead that the claim signed and filed by her former husband, after he had remarried and moved to California, was filed for her benefit. She invokes the law of Texas for the propositions that a marriage is a partnership, and that the former partners of a dissolved partnership necessarily act in each other's behalf in winding up the partnership's affairs. From these premises, petitioner proceeds to the conclusion that her former husband had authority to act on her behalf with respect to a refund of the 1957 taxes, and that he acted for her benefit in filing the claim for refund.

This extension of partnership principles to marriages and divorces is inconsistent with the law of Texas. When a husband and wife owning community property in Texas are divorced without a division of such property by the court, they become tenants in common in the property. *Taylor* v. *Catalon*, 140 Tex. 38, 46, 166 S.W. 2d 102, 104; *Ex parte Williams*, 160 Tex. 314, 316, 330 S.W. 2d 605, 606. As a tenant in common, a former husband no longer represents his former wife. *Roemer* v. *Traylor*, 128 S.W. 685, 689 (Tex. Civ. App.). In the absence of an agreement so providing, there exists no fiduciary

or agency relationship between tenants in common; each tenant acts for himself and has no authority to bind the other. *Zimmerman* v. *Texaco, Inc.*, 409 S.W. 2d 607, 614 (Tex. Civ. App.); *Willson* v. *Superior Oil Co.*, 274 S.W. 2d 947 (Tex. Civ. App.).

In the instant case, it does not appear, nor does petitioner contend, that the right to a refund of 1957 taxes was covered by a property settlement, or that petitioner's former husband was authorized to act in her behalf in filing the claim for refund. It follows that the claim for refund was not filed for her benefit or in her behalf, and that, under the plain language of Section 7422, she is not entitled to sue for a refund of the 1957 taxes in her own right.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

GRANT W. WIPRUD,
JAMES H. BOZARTH,
Attorneys.

SEPTEMBER 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 476250 154